No. 96-1714

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DOROTHY C. ELLIOTT and ARCHIE ELLIOTT, JR., as Representatives of the Estate of Archie Elliott, III,

Petitioners,

vs.

JASON LEAVITT and WAYNE CHENEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

J.H. CREECH
ANDREW J. MURRAY
Associate County Executive
Attorneys for Respondent
Wayne Cheney
Room 5121
County Administration Building
Upper Marlboro, MD 20772
(301) 952-4028

D'ANA E. JOHNSON
Counsel of Record
DANIEL KARP
ALLEN, JOHNSON,
ALEXANDER & KARP
Attorneys for Respondent
Jason Leavitt
Suite 1540
100 East Pratt Street
Baltimore, MD 21202
(410) 727-5000

71246
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

QUESTION PRESENTED

The question presented is whether this Court's holding in *Johnson v. Jones*, 115 S. Ct. 2151 (1995), as explained in *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), that a United States District Court's finding on motion for summary judgment, that there is a genuine question of fact to be resolved at trial, absolutely bars a police officer's right to an interlocutory appeal, and concomitantly deprives the officer of qualified immunity, where plaintiff demonstrates no material evidence whatsoever that would be admissible at trial, as required by Federal Rule of Civil Procedure 56(c), to support a speculative theory that is contradicted by the admissible, corroborated evidence demonstrated by the police officers, but instead plaintiff simply challenges the credibility of the uncontroverted evidence as "inherently improbable."

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Respondents respectfully request that the Court deny the petition for writ of *certiorari* seeking review of an opinion of the United States Court of Appeals for the Fourth Circuit. The court of appeals opinion is reported at 99 F.3d 640 (4th Cir. 1996), *suggestion of rehearing en banc denied*, 105 F.3d 174 (1997). (For the Court's convenience, all citations to the opinions below will be to the opinions attached as appendices to the petition.)

STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in this Court is barred by 28 U.S.C. § 2101(c), however, because the petition for writ of *certiorari* was not timely filed and no application to extend the time for filing a petition for writ of *certiorari* was made to this Court as provided by Rule 13. The question of this Court's jurisdiction to entertain the petition for writ of *certiorari* is argued as a threshold issue below.

STATUTE INVOLVED

28 U.S.C. § 2101 provides in relevant part:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

> (d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

STATEMENT OF THE CASE

Petitioners begin their statement of the case by representing themselves as "a state court judge and a schoolteacher." The status of Petitioners, other than as personal representatives of the estate of the Archie Elliott, III, is not relevant, nor was it in evidence before the district court when it decided this case.[1] Petitioners continue their effort to misdirect the Court by inflating facts that, while undisputed, were not relevant to the pertinent inquiry and by omitting other undisputed facts that were material to the decision below.

A. District Court Proceedings

The district court denied qualified immunity to Respondents solely because it found that it was "factually, inherently questionable" that Elliott could have pointed a gun at the police officers while seated with his hands cuffed behind his back. (A.43[2]). It so held, despite the fact that it expressly found evidence that Elliott "made a gesture with his hands still cu[ff]ed behind his back which appeared to [the officers] to be him pointing a gun in their direction," (A.41) and that the officers "believed they saw a weapon in the hands of Elliott." (A.41).

The district court did not find any genuine dispute of

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1. There is also some question as to accuracy. It is Respondents' understanding that Archie Elliott Jr. is an administrative law judge, not a state court judge.

2. References to "A.[page]" are to the appendix to the petition.

material fact based on the uncontradicted evidence. Rather, it reasoned that the facts were so inherently improbable that even if uncontradicted by any evidence a trier of fact could "ultimately disagree" with them. (A.43). In other words, the district court found that a genuine dispute of material fact can be generated, and summary judgment defeated, merely because a jury could find the uncontroverted factual evidence was not credible. The district court came to this extraordinary conclusion despite the fact that the officers' testimony was corroborated by uncontroverted physical evidence.

Having concluded, erroneously, that it could not grant summary judgment in favor of Respondents on the merits, the district court summarily denied Respondents' motions for summary judgment based on grounds of qualified immunity. The district court failed to recognize that the qualified immunity analysis focuses on the moment when the decision to use force is made. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989); *Drewitt v Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991). Whether the preceding pat-down was adequate is not relevant to the qualified immunity analysis; nor was the fact, determined after the shooting, that the gun Elliott had pointed at the officers was not loaded.

Based on the uncontroverted evidence that "the decedent made a gesture with his hands still cu[ff]ed behind his back which appeared to them to be him pointing a gun in their direction," (A.41) Respondents were entitled to qualified immunity, as a matter of law because a reasonable police officer confronted with a person who appeared to him to be pointing a gun in his direction could believe that his use of deadly force was lawful.[3] *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

3. Petitioners argue that Respondents do not contend merely that they

(Cont'd)

The district court's rationale for refusing to grant qualified immunity can only be characterized as judicial "Monday morning quarterbacking." Having recognized uncontroverted evidence that the officers perceived a gun (A.41), the district court opined,

> arguably it's not clear what [Elliott was] intending to do with the weapon except perhaps move his hands around and be threatening, but the officers on the outside certainly don't have to go on the inside; they can move farther away. When one considers all the options that are here and that were inherent and that were available at the time, certainly it could be argued that the actions of the officers here were not as they stated; that there is a significant issue of credibility. . . .

(A.45-46). There was no evidence before the district court of any "options" to these officers who, the evidence showed, at least *perceived* Elliott to be moving a gun around "be[ing] threatening." (A.45). The officers reasonably could have believed their actions were lawful under the uncontroverted material facts, that is, the facts within their knowledge at the moment of the shooting. *Creighton*, 483 U.S. at 640-41; *Graham*, 490 U.S. at 396-97.

(Cont'd)
perceived that Elliott had a gun, but rather that Elliott in fact had a gun. Petition at 8 n.4. The distinction is irrelevant. At the very least, the district court found evidence that the officers in fact perceived a deadly threat. Nothing in the transcript suggests that the district court gave any credence to Petitioners' unsubstantiated, self-serving speculation that the officers "planted" a gun on Elliott after the shooting. (A.39-47).

B. Uncontroverted Facts

The uncontroverted facts in this case revealed that Officer Leavitt of the District Heights, Maryland, Police Department, while on patrol (R.14[4]), observed a vehicle operated by a man later identified as Archie Elliott, III, (hereinafter "Elliott") being driven on the wrong side of the road, swerving, overcompensating for oncoming traffic, and otherwise driving erratically.[5] (R.21-22[6]). Officer Leavitt initiated a traffic stop. (R.23,25). Elliott was very, very nervous and kept looking at Officer Leavitt's weapon and calling Officer Leavitt "lover." (R.27-28). Elliott reeked of alcohol and appeared to Officer Leavitt to be on a controlled dangerous substance, possibly PCP.[7] (R.28) Elliott's behavior made Officer Leavitt nervous. (R.28-29).

Officer Leavitt called for back-up, advising the dispatcher that he had a drunk driver whom he believed to be on drugs. (R.30-31, 137-38[8]). Elliott could not perform field sobriety tests. (R.29-30,33-35). Elliott was taller than Officer Leavitt, and while

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4. References to "R.[page]" are to the Joint Appendix filed in the court of appeals.

5. This was the fifth incident known to Elliott's mother involving her son's driving while under the influence of alcohol. (R.95).

6. Record pages 7-77 contain excerpts from the deposition of Officer Leavitt.

7. The autopsy revealed that Elliott had a blood alcohol level of between .20 and .28%, which is twice the level considered as being intoxicated for driving purposes in Maryland. (R.96, 113-17, 132).

8. Record pages 134-91 contain excerpts from Officer Cheney's deposition.

the field sobriety tests were being administered Elliott behaved aggressively, reaching into the front of his pants and walking up close to the officer. (R.71-75, 131[9]). Elliott's behavior and aggressive demeanor caused Officer Leavitt, whose requested back-up had not yet arrived, to avoid unnecessary physical contact with Elliott. (R.73).

Respondents' expert on police procedures opined that individuals who are impaired through their use of alcohol often present a greater danger to police personnel because of their impaired judgment. (R.195[10]). Petitioners identified no expert witnesses on any issue, medical or liability, and relied instead on their unsupported, self-serving conclusions that Elliott was too intoxicated to have pulled a gun on the officers.

Officer Leavitt arrested Elliott, who did not resist, handcuffing his hands behind his back and double-locking the handcuffs so that they would not tighten further. (R.36-37). Officer Leavitt briefly patted Elliott down and found no contraband. (R.37). While he remembered checking the back of Elliott's body, Officer Leavitt could not recall whether he checked the front, nor did he remember whether he felt into Elliott's pockets or patted down the pockets. (R.38-39, 50). Because of Elliott's behavior, Officer Leavitt was more concerned with physically securing Elliott in the cruiser promptly and getting him to the station than he was with thoroughly searching Elliott (R.42-43, 48-49, 73-74), who was clothed only in baggy jean shorts and shoes without socks. (R.31, 144, 154, 155).

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9. Record pages 130-33 contain excerpts from Petitioners Response to Request for Admissions.

10. Record pages 192-228 contain the affidavit and report of Kevin Parsons, Ph.D., Respondents' expert on police procedures.

Officer Cheney of the Prince George's County, Maryland, Police Department responded to Officer Leavitt's call for back-up regarding a vehicle occupant who was, according to dispatch, drunk or on some type of drug. (R.138). Officer Cheney arrived as Officer Leavitt was about to place Elliott into his cruiser. (R.41, 139). He assisted Officer Leavitt by getting into the driver's side of the cruiser, moving some objects to the back seat and unlocking and opening the passenger door. (R.41, 148-49, 150). Officer Cheney did not notice any weapons in the cruiser. (R.191). Officer Leavitt put Elliott in the passenger seat of the cruiser, put the seatbelt on him, and closed and locked the door. (R.44, 131, 150-51). The passenger window was closed. (R.43-44, 47, 147, 152-53). To Officer Cheney, Elliott appeared upset with Officer Leavitt at the time. (R.150-51).

Respondents were standing by the passenger side of the cruiser when Sgt. Brown, Officer Leavitt's supervisor, arrived in response to the back-up call. (R.46, 160-62, 230, 235-39[11]). As Sgt. Brown approached, a movement inside the cruiser caught Officer Leavitt's attention. (R.51, 56-57, 164, 240-41). Officer Leavitt had a clear view into the front compartment of the cruiser. (R.47, 51, 242). When Officer Leavitt looked into the cruiser, he found himself staring down the barrel of a small revolver and saw Elliott's right index finger on the trigger. (R.51-52, 56-57, 58-59, 60-61, 70, 88, 89,[12] 245, 246-47). Elliott, who was very thin, had released his seatbelt and twisted his arms to the right part of his body, up and around the mid-section. (R.56-57, 67, 70). He was pointing the handgun directly at Respondents and appeared to be about to fire. (R.51, 52, 56, 57, 60-61, 70, 88, 89, 246-47). Officer Leavitt yelled, "Gun!", ordered Elliott to drop the gun, drew his service revolver and pointed it at Elliott.

11. Record pages 229-47 contain the sworn statement of Sgt. Brown.

12. Record pages 87-91 contain Officer Leavitt's answers to interrogatories.

(R.64, 241, 242-43). Elliott ignored the order, still leaning forward in the seat with his arms twisted around the right side of his body, pointing the gun at the officers with his index finger on the trigger. (R.64). Officer Leavitt moved his right foot back to give some distance from the gun prior to firing. (R.53-54).

Upon hearing Officer Leavitt yell, "Gun!", Officer Cheney drew his service weapon, and looked inside the cruiser. (R.164, 166). Officer Cheney, who also had a view of the inside of the cruiser (R.164-65, 242), also saw the gun, which Elliott held with both hands. (R.164, 166, 174, 249[13]). Elliott, who was still in handcuffs, was leaning toward the driver's side with the gun approximately in the right side of his lap, pointed at the window and directly at Officer Cheney, with his right index finger on the trigger. (R.172-75).

Sgt. Brown, who could not see into the cruiser, heard Officer Leavitt yell, "Gun!" and "Drop it!"; and seconds later, he observed Respondents shooting at the detainee in the cruiser. (R.242-43).

The shooting was over quickly. (R.183). Although twenty-two rounds were fired by the two police officers, neither officer fully discharged his weapon. Officer Leavitt's service weapon still held six rounds; and Officer Cheney's service weapon still held four rounds of ammunition following the shooting. (R.263-65[14]). Fourteen bullets penetrated Elliott's body. (R.96-111,[15] 132). Based on the nature and condition of the wounds, the

13. Record pages 248-50 contain excerpts from Officer Cheney's answers to interrogatories.

14. Record pages 263-65 contain the crime scene processing report prepared by CID.

15. Record pages 96-111 contain the autopsy report.

assistant medical examiner, Dr. Korell, testified that the time period from the first wound to the last was a matter of seconds. (R.128-29[16]). Dr. Korell also testified that one bullet caused injuries to the right fingertips and base of the thumb as part of a common wound path best explained, in her opinion, by Elliott's having held a hard object at the time the injuries were sustained. (R.96-111, 120-22). Elliott never dropped the gun. (R.66-67, 176, 186, 244).

Following the shooting, Officer Cheney opened the car door and retrieved the gun from Elliott. (R.67, 176, 186, 244). He placed the gun on the trunk of the cruiser. (R.67, 176, 177, 178, 186, 244, 251[17]). He then pulled Elliott, who was no longer wearing his seatbelt, out of the cruiser. (R.67-68, 184-89).

The evidence unit investigating the scene of the shooting recovered Elliott's gun, which had a small, blue fiber attached to the trigger. (R.263-65). Upon testing by the Federal Bureau of Investigation, it was determined that the fiber found on Elliott's gun came from Elliott's shorts. (R.270-72[18]). The internal affairs investigation revealed that a few months before the shooting Elliott had threatened a motorist with a handgun. (R.354-55[19]). That motorist, in a sworn statement, identified the

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16. Record pages 112-39 contain excerpts from Dr. Korell's deposition.

17. Record page 251 contains a photograph of the cruiser with Elliott's gun in the position where Officer Cheney placed it after retrieving it from Elliott's body.

18. Record pages 270-72 contain the FBI laboratory report of the fiber tests. The gun was not tested for fingerprints.

19. Record pages 352-55 contain the charging documents of the pre-shooting incident where Elliott threatened a motorist with a gun.

gun found on Elliott's body as the same gun with which Elliott had previously threatened him.[20] (R.356-58[21]).

The case was presented to the grand jury, which declined further action; and the homicide investigation was closed. (R.273[22]). An internal affairs investigation recommended that both officers be exonerated for the shooting.

In the face of these uncontroverted facts, Petitioners argued, based solely on bald assertions and self-serving speculation, unsupported by any evidence that would be admissible at trial, that it was "inherently improbable" that the shooting happened as revealed by the evidence because Elliott was seated with his hands cuffed behind him. Petitioners did not even offer expert testimony to support their theory.[23]

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20. Petitioners suggest in footnote 2 that this statement is not credible because it was given fifteen months after the shooting, but the evidence revealed that the incident report charging Elliott with threatening the motorist with a revolver was filed months before the shooting. (R.355).

21. Record pages 356-58 contain the sworn statement of the motorist identifying Elliott's gun and the affidavit of Officer R.F. Gheen, who took the statement.

22. Record page 273 contains a memorandum regarding the grand jury.

23. Respondents did offer evidence that the events were not "inherently improbable" in the form of expert testimony (R.195) and in the form of a letter from the FBI abstracting numerous specific incidents reported in the FBI publication *Law Enforcement Officers Killed and Assaulted*, where law enforcement officers have been assaulted or killed by offenders who had been restrained, including being seated with hands cuffed behind their backs. (R.345-53).

C. Court of Appeals Proceedings

The court of appeals panel correctly found, and the *en banc* court ultimately agreed, that it had jurisdiction to hear this interlocutory appeal "because it does not involve whether 'particular conduct occurred,' but rather an issue of law — whether uncontroverted conduct represented the use of excessive force. As to the material facts here, *there is no genuine dispute because plaintiff has come forward with no evidence*." (A.10 [citing *Behrens v. Pelletier*, 116 S. Ct. 834, 840 (1996)], *suggestion of rehearing en banc denied*, A.14). The distinction lost on the district court, but which the court of appeals recognized, is that this is not a case of "sufficiency" of evidence. In this case, Petitioners utterly failed to meet their burden under Federal Rule 56(c)of demonstrating the existence of evidence that would be admissible at trial, beyond mere speculation and conjecture to support their claims. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Petitioners merely challenged, without evidentiary support, the credibility of the uncontroverted evidence.

The significance of this distinction from *Johnson v. Jones*, 115 U.S. 2151 (1995), and *Behrens* was explained by the majority opinion of the *en banc* court in denying the suggestion for rehearing *en banc*: Denial of an interlocutory appeal where plaintiffs have not demonstrated any evidence, only speculation and conjecture, that " 'the police are lying' " would permit plaintiffs "to receive an automatic trial" in contravention of the principles established by *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and its progeny, including *Johnson v. Jones* and *Behrens*. (A.17).

The judgment of the court of appeals was entered on November 8, 1996. (A.1). A timely petition for rehearing in the

court of appeals would have tolled the running of the time for filing a petition for writ of *certiorari*. Rule 13(3). Petitioners did not file such a petition, which would have been due November 22, 1996, Fed. R. App. P. 40(a), and the time for petitioning this Court was not tolled.

On December 2, 1996, after the time for petitioning for rehearing had expired, the court of appeals issued its mandate, which it recalled the same day when a member of the court requested a poll on whether the case should be heard *en banc*. (A.12). The court of appeals did not vacate its November 8, 1996, judgment by the December 2 order. (A.13). A divided *en banc* court denied the suggestion for rehearing *en banc* on January 24, 1997 (A.14); and the mandate was issued on February 3, 1997.

The time for filing a petition to this Court for writ of *certiorari* did not expire until February 6, 1997. Petitioners still had at least until January 27, 1997, under Rule 13(5), to request that this Court grant them an extension of time of up to sixty days to file their petition. Indeed, in extraordinary circumstances such as Petitioners contend exist in this case, the request for an extension of time could have been made later. Rule 13(5). Petitioners' counsel in the court of appeals proceeding is located in Washington, D.C.; so there were no geographic barriers to the timely filing of a request for extension of time. Nevertheless, no request for an extension of time was made by Petitioners.

Petitioners made no effort whatsoever to preserve their right to ask this Court to invoke its discretionary jurisdiction.

On or about March 17, 1997, more than one month after the time for filing a petition for writ of *certiorari* under this Court's Rules had lapsed, Petitioners filed a motion for re-entry

of judgment. Petitioners stated in their motion that its purpose was "to clarify the procedural significance of the court of appeals's unusual *sua sponte* actions" in vacating the mandate. On April 1, 1997, almost two months after the time for filing a petition for writ of *certiorari* had passed, the court of appeals vacated the November 8, 1996, judgment and re-entered it, without change, *nunc pro tunc* as of January 24, 1996, the day the court had filed its opinion denying the suggestion for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO CONSIDER THE PETITION.

This Court lacks jurisdiction to entertain the petition under 28 U.S.C. § 2101(c), which provides in pertinent part as follows:

> any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall* be taken or applied for within ninety days after *the entry of such judgment or decree*. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period *not exceeding* sixty days. [Emphasis added.]

Missouri v. Jenkins, 495 U.S. 33 (1990). Unlike criminal cases, where Congress provided for exercise of the Court's discretionary jurisdiction "as prescribed by the rules of the Supreme Court," 28 U.S.C. § 2101(d), there is no discretion to

consider a petition for writ of *certiorari* in a civil action that is filed more than one hundred fifty (ninety plus sixty) days after entry of the judgment. The latest date on which Petitioners could have filed their petition was April 7, 1997, one hundred fifty days after the entry of judgment on November 8, 1996. Rule 13(2).

Petitioners cannot claim ignorance. The time for petitioning for review on *certiorari* is clearly set forth in Rule 13(1):

> Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after *entry of the judgment*. . . . [Emphasis added.][24]

The time for filing a petition for writ of *certiorari* expired on February 6, 1997, without any action by Petitioners.

Petitioners could timely have filed a petition for rehearing, which would have tolled the time for petitioning this Court for a writ of *certiorari*. Rule 13(3). They did not file such a petition.

Petitioners could timely have filed a request for an extension of time within which to petition for writ of *certiorari* after the court of appeals denied the suggestion for rehearing *en banc* on January 24, 1997. Rule 13(5). A request for extension could have been sought at least as late as January 27, 1997, and possibly later based on "extraordinary circumstances." Rule

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24. *Compare* Md. Rule 8-302 (requiring filing of petition for *certiorari* to state's highest court "not later than 15 days after the Court of Special Appeals issued its *mandate*") [emphasis added].

13(5). Petitioners did not request an extension, and the time for petitioning for a writ expired without any action on Petitioners' part.

Instead of availing themselves of the ample opportunities under the rules to protect themselves, Petitioners chose to do nothing. Petitioners may have been confused by the uncertainty created when the court of appeals withdrew its original mandate in December, but they took an unnecessary and unwarranted risk when they took no action either to file their petition for writ of *certiorari* by February 6, 1997, or to request an extension of time to file such petition.

Petitioners waited until March 17, 1997, more than a month after the court of appeals had issued its mandate, to request that the court of appeals vacate its four-month-old judgment and give Petitioners another "bite at the apple." The excuse offered for their dilatory action was that the court of appeals' withdrawal of its mandate and *sua sponte* suggestion for rehearing *en banc* was so unusual that Petitioners were uncertain of when the time for filing a petition expired. They made no attempt to excuse their failure to follow the rules of this Court to protect themselves, nor did they cite any authority by which the court of appeals had the power to manufacture jurisdiction in the Supreme Court by manipulating the entry of judgment.[25]

Moreover, Rule 13(3) could not have been more clear: "A suggestion for rehearing *en banc* is *not* equivalent to a petition for rehearing within the meaning of this rule unless so treated by the United States court of appeals." [Emphasis added.] If the

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25. None of the cases cited by Petitioners supported the arguments made in their motion for re-entry of judgment. Four cases involved proceedings where a party had in fact filed a petition for rehearing, and five more were criminal cases where considerations of due process and the right to effective assistance of counsel mandated the results.

suggestion for rehearing *en banc* was the anomaly Petitioners claim, there would not be an express provision in the Court's rules to cover it.

Whether, as Petitioners claim, the court of appeals mistakenly believed that withdrawal of the mandate would toll the time for filing a petition for writ of *certiorari*, Petition at 14 n.5 (citing *Moore v. United States*, 360 F.2d 353, 357 n.1 (4th Cir. 1965), *cert. denied*, 385 U.S. 1001 (1967)), the fact remains that the court of appeals did not treat the *sua sponte* suggestion for rehearing *en banc* as a petition for rehearing under Supreme Court Rule 13(3), thereby tolling the time for filing a petition for writ of *certiorari*. The court of appeals made no mention in its order withdrawing the mandate that it intended to stay the tolling of the time for petition for *certiorari*. The court of appeals acted promptly on the suggestion, especially considering the degree of disagreement within the court, and filed its denial before the expiration of the time for filing a *certiorari* petition, and also within the time permitted to request an extension of time to petition for writ of *certiorari* under Rule 13(5). Indeed, the mandate was issued prior to the expiration of the time for filing a petition for writ of *certiorari*.

Petitioners' motion for re-entry of judgment was filed more than thirty days after entry of the mandate. Therefore, the court of appeals no longer had any jurisdiction over this case. *Boston and Maine Corp. v. Town of Hampton*, 7 F.3d 281, 282 (1st Cir. 1993); *Johnson v. Bechtel Assoc. Prof. Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986); *United States v.DiLapi*, 651 F.2d 140, 144 (2nd Cir. 1981), *cert. denied sub nom., Ladmer v. United States*, 455 U.S. 938 (1982). The court of appeals had no jurisdiction to vacate and reissue its judgment *nunc pro tunc* on April 1, 1997, because its mandate had issued on February 3, 1997. Even assuming arguendo that the court of appeals had the power to do so, the court did not withdraw its mandate prior to vacating

and re-entering the judgment. The April 1, 1997, order is a nullity.

This Court does not have jurisdiction to entertain the petition. Even if discretionary jurisdiction did exist, the Court should deny the petition in view of Petitioners' utter disregard of this Court's rules.

II.

THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH *JOHNSON v. JONES* OR *BEHRENS.*

In *Johnson v. Jones*, 115 S. Ct. 2151 (1995), this Court held that a denial of summary judgment on grounds of qualified immunity is not immediately appealable when the appeal simply challenges the factual conclusion that the record reveals a genuine issue of material fact and raises no legal issue as to the claim of qualified immunity. In that case, the Court sought to stem the tide of automatic interlocutory appeals where summary judgment based on qualified immunity was denied based solely on factual evidentiary disputes. *Johnson*, 115 S. Ct. at 2159.

It soon became apparent that the opinion in *Johnson v. Jones* was being interpreted too broadly by the circuit courts of appeals, which cited it in denying interlocutory appeals on grounds of qualified immunity in virtually every case where the district court had found a question of fact. In *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), this Court rejected the broad interpretation of *Johnson v. Jones* being espoused in the circuits:

> [R]espondent asserts that appeal of denial of the summary-judgment motion is not available because the denial rested on the ground that "[m]aterial issues of fact

> remain." This, he contends, renders the denial unappealable under last Term's decision in *Johnson v. Jones. That is a misreading of the case.* [Citation omitted; emphasis added.]

Both *Behrens* and *Johnson v. Jones* clearly hold that a denial of qualified immunity is immediately appealable "to the extent it turns on an 'issue of law'." *Behrens*, 116 S. Ct. at 841 (quoting *Mitchell v. Forsyth*, 472 U.S. at 530); *Johnson v. Jones*, 115 S. Ct. at 2156.

The instant case is not simply another case where a defendant attempts to circumvent a trial that is necessary to resolve genuine factual issues upon which a finding of qualified immunity depends. This case involves a question of law. The sufficiency of the evidence to support a *prima facie* case is first a question of law for the court. Typically, a district court's determination as to sufficiency of evidence involves the weighing of evidence on both sides of a scale, which under *Johnson v. Jones*, should not be considered on interlocutory appeal.

By contrast, this case turns on the threshold purely legal question whether Petitioners met the burden imposed upon them by Fed. R. Civ. Proc. 56(c) to demonstrate the *existence* of evidence to establish each essential element of their case on which they will bear the burden of proof at trial. *Celotex v. Catrett*, 477 U.S. 317, 322-23. Petitioners could not meet that burden by any evidence material to the qualified immunity analysis. That is, they offered no evidence, only self-serving speculation and conjecture, to controvert the evidence that at the moment Respondents shot Elliott they could have believed he had a gun pointed at them and that their use of deadly force was lawful. *Creighton*, 483 U.S. at 640-41; *Graham*, 490 U.S. at 396-97; *Greenidge*, 927 F.2d at 792.

However strenuously Petitioners argue that the uncontroverted facts are "inherently improbable," the fact remains that they could not fulfill their burden on summary judgment to refute the evidence demonstrated by Respondents with evidence that would be admissible at trial. Fed. R. Civ. Proc. 56(c). As this Court recognized in *Celotex*, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23.

In opposing summary judgment, Petitioners were required to "do more than simply show there is some metaphysical doubt as to the material fact." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Nevertheless, Petitioners contended, and the district court agreed, that merely raising the issue of credibility of Respondents could defeat summary judgment. (A.43). They demonstrated no evidence to support their claim that Respondents were lying, as the plaintiffs had in *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992), *cert. denied*, 115 S. Ct. 1097 (1995) (the only case cited by the district court to support its legal ruling).[26] Petitioners did not even demonstrate evidence that would be admissible at trial to support their claim that the facts supported by the evidence were "inherently improbable," although Respondents demonstrated evidence that they were not "inherently improbable."

Even if it were appropriate to deny summary judgment merely because the only evidence is derived from testimony of

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26. In *Hopkins*, unlike the instant case, there was *evidence* to *contradict* the police officer's testimony: the officer's testimony contradicted what the hospital records revealed he had told the hospital personnel immediately after the incident; and the court found not one, but two separate shootings several minutes apart which contradicted the officer's claim of exigency. *Hopkins*, 958 F.2d at 885-86.

the defendant — and it is not — this is not such a case. Respondents' testimony was corroborated both by testimony of others and by physical evidence. Sgt. Brown, while he could not see into the car, could see the shooting, and he observed Officer Cheney retrieve the gun from Elliott's body and place it on the trunk of the cruiser; there was a photograph taken at the scene of the bloody gun on the trunk of the cruiser; there was testimony from the medical examiner and an autopsy report establishing that Elliott was holding a hard object in his right hand when he was shot; there was a lab report tying the fiber from the gun to Elliott's pants; there was even a witness who testified that a few months before the shooting Elliott had threatened him with the same gun. As Chief Judge Wilkinson observed, "If qualified immunity does not obtain here, it will not obtain anywhere." (A.17).

Recently, the Court of Appeals for the Fourth Circuit considered this issue again in *Jackson v. Long*, 102 F.3d 722 (4th Cir. 1996).[27] *Jackson v. Long* involved a claim by prison officials of deprivation of property interest in employment and stigmatizing discharge against a sheriff who terminated their employment after reports that one of the officials had raped an inmate. Judge Niemeyer explained the court's reasoning for taking interlocutory jurisdiction over the appeal as follows:

> In the case before us, the district court was troubled by whether [plaintiffs] actually participated in the conduct for which the announced investigation placed them under suspicion. It concluded that factual questions existed about whether the assault occurred and whether, when charges were dropped, the plaintiffs were stigmatized. While these may

27. Judge Motz served on the panel in this case and concurred in the judgment only.

be disputed factual questions, they are not material to the abstract question of Sheriff Long's immunity, which depends on whether Sheriff Long violated clearly established constitutional rights and whether he reasonably should have so known. The facts which are relevant for determining whether Sheriff Long has immunity must be taken from the viewpoint of Sheriff Long at the time he terminated the jailers and not of an independent factfinder looking later in hindsight at whether the assault actually occurred or whether Sheriff Long proved to be right in his decisions. No factual question was raised about whether Sheriff Long reasonably believed that sufficient facts existed to initiate an investigation or that he could, as a matter of law, dismiss [plaintiffs] as at-will employees.

Since the facts relevant to the nature of the complaint presented to Sheriff Long and his response are not in dispute, we are left with the legal questions of whether Sheriff Long's response violated clearly established constitutional rights and, if so, whether Sheriff Long reasonably should have known that it did. This posture of undisputed facts about Sheriff Long's belief is precisely that which enables us to resolve immunity, as we should, before trial "at the earliest possible stage of a litigation." See *Anderson v. Creighton,* 483 U.S. 635, 565 n.6 []. This is important because qualified immunity is "an entitlement not to stand trial or face the other

> burdens of litigation." *Behrens*, 116 S. Ct. at 838 (quoting *Mitchell*, 472 U.S. at 526).

102 F.3d at 727; *accord Winfield v. Bass*, 106 F.3d 525, 530 (4th Cir. 1997) (appellants pressed "the legal issue of whether the undisputed facts disclose that reasonable officers would have understood that their conduct violated Winfield's clearly established legal rights" as opposed to merely arguing insufficiency of the evidence) (J. Motz, concurred in this opinion as well).

Like the district court in *Jackson v. Long*, the district court in this case found a factual dispute based on issues irrelevant to the qualified immunity inquiry. It questioned whether it was "inherently improbable" that Elliott had a gun based on the question whether the earlier pat-down was adequate and the later discovery that Elliott's gun was not loaded. Those factors were not relevant to the police officers' decision, when they perceived Elliott holding a gun pointed at them with his finger on the trigger, to meet that threat with deadly force. The district court did not find a dispute of fact as to whether the gun was in Elliott's hands. Rather, the court disputed whether the officers' reaction to the perceived threat was reasonable in view of the fact that Elliott had been patted down earlier and his gun was not loaded.[28] The reasonableness of the officers' action is precisely the legal analysis for qualified immunity — whether a reasonable officer under the same circumstances would have understood he was acting unlawfully — and it is reviewable *de novo* immediately on appeal.

The court of appeals in this case correctly refused to deprive

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28. The court even went so far as to count the bullets, as if a reasonableness determination could be made based upon whether 22 bullets or some lower number had been fired in the seconds during which the shooting occurred. (A.46-47).

Respondents of an interlocutory appeal where, after discovery had been closed, Petitioners could not demonstrate on summary judgment, as a threshold issue of law, any relevant dispute of fact to contradict the corroborated evidence that the police officers at least perceived that Elliott had a gun pointed at them with his finger on the trigger and were reasonable in meeting that threat with deadly force. That holding logically flows from the reasoning of *Johnson v. Jones* and *Behrens* and espouses the consideration underlying those cases to deter interlocutory appeals where a trial is necessary to resolve genuine issues of material fact without, as Petitioners urge, sacrificing the important public policies set forth by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Mitchell v. Forsyth*, and their progeny.

III.

THE FOURTH CIRCUIT IS NOT BOUND BY DECISIONS OF OTHER CIRCUITS.

In her passionate dissent to the denial of suggestion for rehearing *en banc*, Judge Motz argued that the court of appeals should ignore the threshold issue of law present in this case and the precedent and public policies underlying *Harlow* and *Mitchell* merely because other circuits have broadly applied *Johnson v. Jones* as a blanket bar to all interlocutory appeals based on qualified immunity where the district court found a dispute of fact. Obviously, the fourth circuit court of appeals is not required to interpret every case exactly the way every other circuit interprets it.

This case presents the exceptional situation, apparently either not encountered or not perceived by the other circuits, where a plaintiff failed, as a matter of law, to meet defendants' evidence on summary judgment with a showing of contravening

evidence that would be admissible at trial as required by Fed. R. Civ. Proc. 56(c). Certainly, the court of appeals cannot be faulted for recognizing that in this case, as a matter of law, Petitioners have not met their burden on summary judgment and that it would be the height of injustice to deny Respondents qualified immunity.

As *Behrens* has demonstrated, a blind application of *Johnson v. Jones* to bar every immediate appeal of denial of qualified immunity was never this Court's intent. "*Every* denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact. . . ." *Behrens*, 115 S. Ct. at 842 [emphasis in original]. Half of the cases canvassed by Judge Motz to support her dissenting opinion were decided before *Behrens*, and none of them considered *Behrens* in their reasoning. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *Shinault v. Cleveland County Bd. of County Comm'rs*, 82 F.3d 367, 369 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 740 (1997); *Woolfolk v. Smith*, 81 F.3d 741, 743 (8th Cir. 1996); *Rambo v. Daley*, 68 F.3d 203, 207 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1546 (1996); *Tamez v. City of San Marcos*, 62 F.3d 123, 125 (5th Cir. 1995); and *Stella v. Kelley*, 63 F.3d 71, 75 (1st Cir. 1995).

The court of appeals appropriately recognized the distinction between the existence of evidence and mere speculation and conjecture, and correctly held that speculation and conjecture are not sufficient to deprive defendants who have been denied qualified immunity of an immediate appeal.

CONCLUSION

Because the petition was not timely filed, this Court lacks jurisdiction to grant a writ of *certiorari* to the court of appeals in this case. Even if jurisdiction existed, the petition should be

denied because of Petitioners' utter disregard of the Court's Rules.

The petition should be denied on the additional basis that there is no compelling reason to grant it. It is a correct interpretation of *Johnson v. Jones* and *Behrens*, and a logical extension of their reasoning and the balance sought by this Court to be achieved between them and the important public policy considerations underlying *Harlow* and *Mitchell v. Forsyth*.

The writ of certiorari should be denied.

Respectfully submitted,

D'ANA E. JOHNSON
Counsel of Record
DANIEL KARP
ALLEN, JOHNSON,
ALEXANDER & KARP
Attorneys for Respondent
Jason Leavitt
Suite 1540
100 East Pratt Street
Baltimore, MD 21202
(410) 727-5000

J.H. CREECH
ANDREW J. MURRAY
Associate County Executive
Attorneys for Respondent
Wayne Cheney
Room 5121
County Administration Building
Upper Marlboro, MD 20772
(301) 952-4028